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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SMITH YANG et al., Defendants and Appellants.	F071067 (Super. Ct. Nos. VCF266590C, VCF266590D) **OPINION**

APPEAL from judgments of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

John J. Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant Smith Yang.

Linda Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant Blong Yang.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Robert K. Gezi and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Smith Yang and Blong Yang of committing assault with a deadly weapon and active participation in a criminal street gang. The verdicts included gang-related enhancement findings. Smith Yang challenges the admissibility of certain trial evidence in light of the holdings in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*) and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), which were decided while this appeal was pending. We affirm the judgment against Smith Yang in full.

Blong Yang joins in Smith's claims (we hereafter refer to appellants by their first names) and further contends there was insufficient evidence of his active participation in a criminal street gang. In supplemental briefing, he asks for a new sentencing hearing to seek relief under Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill 1393), which gives trial courts discretion to strike or dismiss prior serious felony conviction enhancements. We affirm Blong's convictions but order a limited remand to allow the trial court to consider exercising its expanded sentencing discretion under Senate Bill 1393.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants were among six defendants charged in connection with an attack on a grocery store clerk in Visalia. The defendants were of Asian descent and most of them were related to each other. At least four of the defendants resided in the same home, including brothers Smith and Blong.

Three defendants pleaded out of the case: Koomeej Joshua Xiong (Joshua Xiong), Jonathan Yang, and Meng Yang. Smith and Blong were jointly tried with codefendant Sou Saeteurn (not a party to this appeal) on two counts of assault with a deadly weapon (Pen. Code,[1] § 245, subd. (a)(1); counts 1 & 2) and one count of active participation in a criminal street gang (§ 186.22, subd. (a); count 3). Counts 1 and 2 included enhancement allegations of gang-related conduct (§ 186.22, subd. (b)(1)) and personal infliction of

[1]Unless otherwise specified, all statutory references are to the Penal Code.

great bodily injury (§ 12022.7, subd. (a)). It was further alleged that Blong had suffered a prior strike and serious felony conviction (§§ 667, subds. (a), (b)–(i), 1170.12, subds. (a)–(d)) and had served a prior prison term (§ 667.5, subd. (b)).

Prosecution Case

The victim, a young man apparently of Hispanic ethnicity, testified to having been attacked at work by a group of Asian males. The perpetrators confronted him as he was assisting a patron in the parking lot of a grocery store. He recalled hearing someone use the term "Buster." Next, he was struck from behind with a wooden cane and the group converged on him, throwing punches. The victim did not know his attackers, and he denied having said or done anything to provoke the assault. Count 1 was based on this initial series of events.

The attack in the parking lot ended when the victim broke free and ran into the store. Several of the assailants followed him inside and surrounded him. The victim was punched a few more times before he fell to the ground, at which point the Asian men kicked and stomped his head and upper body. He was also struck with some type of stick or club (presumably a piece of the now-broken cane). The perpetrators fled before the police arrived, leaving the victim with injuries that included a fractured nose and bruises on his head, arms, and back. Count 2 was based on the events inside of the store. The entire incident was captured on video by surveillance cameras, and the footage was shown to the jury at trial.

Detective Daniel Ford of the Visalia Police Department was asked to assist in the investigation because of his expertise with regard to "Asian gangs within the City of Visalia and in the area [extending] as far as Merced." Upon reviewing the surveillance videos, he recognized Smith, Blong, and codefendant Saeteurn as being among those who had attacked the victim. Detective Ford identified each of them again at trial, explaining to the jury their respective roles in the assault, and testified he was "one hundred percent sure" of his identifications.

During custodial interviews, Smith and Saeteurn admitted being present during the incident and alleged the victim had provoked the attack by calling one of their friends a "gook." Saeteurn further admitted to kicking the victim, but he denied being a gang member. Smith admitted to participating in the assault inside of the store and acknowledged his membership in a criminal street gang called the "Asian Bloods," but he recanted the latter admission.

Detective Ford identified Blong as the person who could be seen in the surveillance videos wearing a white tank top undershirt, long khaki shorts, calf-high white socks, and a pair of slippers. At the time of his arrest, two days after the incident, Blong was found lying on a couch next to a pair of slippers that Detective Ford believed were the ones he had worn during the assault. A search of the home also yielded a pair of khaki shorts, which allegedly matched the length and color of those seen in the videos.

Blong had previously admitted to Detective Ford that he was a gang member. The two of them were well-acquainted. Blong testified he had been in contact with the detective "several times, [approximately] seven, eight, nine times …," adding, "He comes to my house a lot." During a custodial interview in this case, Blong denied personal involvement in the crimes but insinuated the victim had been targeted because of an actual or perceived connection to a Hispanic gang known as the Norteños.[2]

Testifying as an expert witness, Detective Ford alleged the existence of a criminal street gang called the Asian Bloods. He claimed there were approximately 50 members of the Asian Bloods in Visalia during the relevant time period, and the gang's primary activities included "[a]ssaults with a deadly weapon, attempted murder, shootings, … vehicle burglaries, [and] a lot of theft-related activity." To establish the "pattern of criminal gang activity" required for the gang participation charge and related

[2]The victim denied being a gang member or having any friends or relatives who are gang members.

enhancements (§ 186.22, subd. (f); see further discussion, *post*), Detective Ford related information about two prior offenses committed by individuals not involved in the current case.

According to the expert, members of the Asian Bloods identify with the color red and use hand gestures to signify their gang affiliation. Although they had once been aligned with the Norteños, or at least on good terms with them, Asian Bloods in the Visalia area viewed Norteños as their enemies. Detective Ford explained that in gang culture, "Buster" is a derogatory term used by rivals of the Norteños to convey disrespect. Similarly, and particularly in Visalia, the racial slur "gook" is used by Norteños as "the most common way to refer to an Asian gang member."

Detective Ford opined that Smith and Blong were active members of the Asian Bloods and the charged offenses were committed in association with, and for the benefit of, a criminal street gang. His opinions were partially based on their self-admissions of gang membership. As noted, Smith and Blong had allegedly confirmed their membership status to Detective Ford on prior occasions. In addition, they had made incriminating disclosures to jail personnel during intake interviews following various arrests. As documented on inmate classification questionnaires received into evidence, Smith had made such admissions during three separate stints in the county jail, including his arrest in this case. He had twice acknowledged an association with the Asian Bloods, and in all three instances had written "Northerners" in response to a question regarding his "known enemies." Blong, who had been jailed at least four different times, had always denied being associated with gangs but sometimes wrote "North" or "Buster" in response to the question about his known enemies.

Detective Ford's opinions were also based on evidence of Smith's and Blong's history of associating with other alleged gang members, wearing "gang clothing" and/or displaying gang hand signs, and their alleged involvement in gang-related crime (i.e., the currently charged offenses). At least three of the victim's attackers had worn red

clothing, including Joshua Xiong and codefendant Saeteurn. Saeteurn had also worn a red hat, and the cane used by Joshua Xiong to strike the victim had been painted red. Moreover, some of the codefendants who pleaded out of the case, including appellants' brother, Meng Yang, had previously admitted, both to Detective Ford and on jail classification questionnaires, that they were members or associates of the Asian Bloods.

To further establish appellants' gang ties and their identities in the surveillance videos, the jury was shown photographs taken of them on the day of their arrest. Neither Smith nor Blong wore red during the subject incident, but both had been photographed on prior occasions either wearing red (Smith) or flashing gang signs (Blong). The prosecution introduced photos obtained from Blong's Myspace page, a social networking Web site, which included a profile picture of him contorting his fingers to form what Detective Ford alleged was a gang sign.

Eight additional photos from the Myspace page showed Smith and Blong congregating with a group of Asian males, many of whom were wearing red jackets, red shirts, and red hats, and flashing alleged gang signs with their hands and fingers. Joshua Xiong appeared in multiple photos next to Smith wearing a red hat and displaying hand signs. Several people wore hats with the "B" logo of the Boston Red Sox, which Detective Ford opined was not indicative of sports fandom but rather signified their affiliation with the Asian Bloods. In six of the photos, Smith was wearing a red Cincinnati Reds jacket and matching red hat, which Detective Ford likewise opined was because his gang identifies with the color red and not because he is a fan of a baseball team from Ohio. Blong appeared in several of the group photos, and, though not in red, he repeatedly displayed the same alleged gang sign (i.e., the one seen in his profile picture) and wore oversized khaki/light gray shorts that extended down over long white socks—the same distinctive style of dress as was exhibited by one of the victim's attackers.

Defense Case

Each defendant testified on his own behalf. Codefendant Saeteurn alleged he was intoxicated on the night in question and could recall only two things: (1) the victim called someone a "gook" and (2) he reacted by assaulting him. Saeteurn claimed to have amnesia with regard to every other aspect of the incident, to the point of not even knowing if he had acted alone or with other people. Nevertheless, he confirmed Detective Ford had accurately identified him from the surveillance videos.

Smith admitted being present when the incident occurred but denied participating in the assault. He claimed Detective Ford had mistakenly identified him and Blong from the surveillance videos, and he testified Blong was not at the grocery store that evening. On cross-examination, when questioned about the photographs of Blong from Blong's Myspace page, he told the prosecutor, "I don't recall that being my brother." Smith confirmed some of the photos were of him, and he admitted having "family and friends who are known as—or classified as Asian Blood," but denied he was a gang member. As for the alleged display of gang signs by the people with whom he had posed for pictures, he said, "I wasn't aware of them, but I can't speak for those individuals who are throwing up signs."

Blong denied being a gang member but admitted he and some of his relatives "associate" with gangs. He denied any involvement in the charged offenses and testified that none of the photographs from his Myspace page were actually of him. Blong's credibility was impeached with evidence of multiple prior felony convictions: first degree residential burglary (§§ 459, 460, subd. (a)), possession of a firearm by a convicted felon (former § 12021, subd. (a)), receiving stolen property (x 2) (§ 496, subd. (a)), and possession of marijuana for sale (Health & Saf. Code, former § 11359).

Smith and Blong called two expert witnesses to refute the gang allegations. These experts essentially opined that their clients were not gang members and the subject

incident did not involve any gang-related crimes. This testimony is further summarized in our Discussion, *post*.

Verdicts and Sentencing

Appellants were convicted as charged and all enhancement allegations were found to be true.

Smith was sentenced to an aggregate prison term of seven years, calculated as follows: the middle term of three years for count 1, plus a consecutive three-year term for the great bodily injury enhancement and a consecutive one-year term for count 2 (one third of the middle term). Punishment for the great bodily injury enhancement on count 2 and the count 3 conviction of active participation in a criminal street gang was stayed pursuant to section 654. Punishment for the gang enhancement findings on counts 1 and 2 was stricken.[3]

Blong was sentenced to an aggregate prison term of 23 years, calculated as follows: the upper term of four years for committing assault with a deadly weapon as alleged in count 1, doubled to eight years because of the prior strike, plus a consecutive 10-year term for the gang enhancement (§ 186.22, sub. (b)(1)(C)). A concurrent sentence was imposed for count 2. The trial court stayed punishment for the great bodily injury enhancements and the substantive gang offense. Blong's sentence was further enhanced by a consecutive five-year term for the prior serious felony conviction.

Appellate Proceedings

On February 26, 2018, this court issued an opinion reversing appellants' convictions for the substantive gang offense and the gang enhancement findings, and affirming the judgments in all other respects. The People filed a petition for rehearing,

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[3]The parties' briefs erroneously state that Smith's gang enhancements were stayed. The reporter's transcript and the second amended abstract of judgment (dated Feb. 26, 2016) clearly indicate that punishment for the gang enhancement findings, which would have otherwise added a consecutive 10-year term of imprisonment (§ 186.22, subd. (b)(1)(C)), was stricken pursuant to section 186.22, subdivision (g).

which was granted, and the parties filed supplemental briefing on the issue of whether testimony by the People's gang expert on matters relating to the "pattern of criminal gang activity" requirement in section 186.22 entailed "case-specific facts" as contemplated by *Sanchez*. On July 31, 2018, we issued a new opinion affirming the judgments in full.

Smith and Blong appealed our decision to the California Supreme Court. Smith's petition for review was denied. Blong's petition was granted and the case was transferred back to this court with directions to "reconsider the cause in light of Senate Bill No. 1393 …." The parties have since filed supplemental briefs regarding Blong's ability to seek relief under the new law.

DISCUSSION

I. Sufficiency of the Gang Evidence

A. Standard of Review

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The jury's findings on enhancement allegations are reviewed under the same standard. (See *People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)

B. Law and Analysis

Section 186.22 proscribes the substantive offense of active participation in a criminal street gang, as set forth in subdivision (a), and includes enhancement provisions, which are found in subdivision (b). (*Elizalde, supra*, 61 Cal.4th at pp. 538–539.) The

elements of the substantive offense are: "First, active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; second, knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and third, the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.) The enhancement provisions apply when an offense is committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b).)

Blong challenges the sufficiency of the evidence supporting his gang participation conviction and the related enhancement findings, but his arguments are of the kind suited for closing summation to a jury. He complains the criteria upon which Detective Ford relied was "overbroad" and sometimes contradictory, e.g., he placed great weight on jail classification questionnaires wherein Blong had listed Norteños as being among his enemies but ignored Blong's contemporaneous denials of having any gang associations. Blong further emphasizes that most of the alleged gang members with whom he was known to associate were immediate family members or close relatives. These points are not helpful to his claim. "Even where, as here, the evidence of guilt is largely circumstantial, our task is not to resolve credibility issues or evidentiary conflicts, nor is it to inquire whether the evidence might reasonably be reconciled with the defendant's innocence." (*People v. Zaragoza* (2016) 1 Cal.5th 21, 44.)

Turning again to the applicable law, active participation in a criminal street gang can be proven by evidence of a defendant's self-admission of gang membership, contacts with a particular gang and/or its members, gang-related contacts with police, and being in the company of a gang member while committing a charged offense. (See *People v. Castenada* (2000) 23 Cal.4th 743, 752–753; *People v. Williams* (2009) 170 Cal.App.4th 587, 626; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1511.) A defendant's

knowledge that the gang's members have engaged in a pattern of criminal activity is often inferable from the same evidence of his or her active participation in the gang. (*People v. Carr* (2010) 190 Cal.App.4th 475, 489 & fn. 14; e.g., *Castenada, supra,* at p. 752 ["every person incurring criminal liability under section 186.22(a) has aided and abetted a separate felony offense committed by gang members"].) The third element, which requires willful promotion, furtherance, or assistance in the commission of a felony by gang members, can be established by showing either the defendant's direct perpetration of the felony or actions that constitute aiding and abetting. (*People v. Rodriguez, supra,* 55 Cal.4th at pp. 1132, 1135–1136; *People v. Ngoun* (2001) 88 Cal.App.4th 432, 435–437.)

"It is the province of the trier of fact to decide whether an inference should be drawn and the weight to be accorded the inference." (*People v. Massie* (2006) 142 Cal.App.4th 365, 374.) As discussed, there was evidence Blong had admitted to Detective Ford that he was a gang member, as had some of his codefendants. Having viewed the photographs from his Myspace page, we have no trouble concluding the jury, aided by the testimony of Detective Ford, could have reasonably believed those images showed Blong flashing gang signs and associating with other gang members. There was ample proof Blong and his codefendants engaged in felonious conduct by assaulting the victim. This evidence, taken as a whole and viewed in the light most favorable to the judgment, was sufficient to prove active participation in a criminal street gang. (*People v. Carr, supra,* 190 Cal.App.4th at p. 489 [jury may rely on circumstantial evidence and expert testimony "to make findings concerning a defendant's active participation in a gang"]; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331 [sufficient evidence of active participation found where gang expert relied, inter alia, on defendant's self-admission of gang membership and his commission of a charged felony with another gang member].) The same is true with regard to the gang enhancement findings. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [jurors can reasonably infer a

crime was committed "in association" with a criminal street gang if defendant committed the offense with fellow gang members].)

II. Admissibility of the Gang Evidence

While this appeal was pending, the California Supreme Court issued its decisions in *Elizalde* and *Sanchez*. These cases announced changes in the law with respect to the admissibility of incriminating statements made during jail intake interviews (*Elizalde*) and the use of hearsay in expert witness testimony (*Sanchez*). Appellants' arguments rely on these opinions, and there is a preliminary question regarding the timeliness of their claims. The People allege forfeiture based on a lack of necessary objections.

"Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence." (*People v. Welch* (1993) 5 Cal.4th 228, 237.) There is a split of authority on the issue of forfeiture in cases where the trial proceedings occurred prior to the *Sanchez* decision. (Compare *People v. Flint* (2018) 22 Cal.App.5th 983, 996–998 [*Sanchez* claim not forfeited because objections would have been futile] and *People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507–508 [same] with *People v. Blessett* (2018) 22 Cal.App.5th 903, 925–941, rev. granted Aug. 8, 2018, S249250 [*Sanchez* claim forfeited because "the change in the law was foreseeable" and objections would not have been futile].) In our earlier opinions, we adopted the reasoning of *Jeffrey G.* and concluded appellants' claims were not forfeited. We do so again, but also note appellants have presented an alternative claim of ineffective assistance of counsel based on the failure to preserve issues for appellate review. Were we inclined to accept the People's forfeiture argument, the merits of appellants' claims would be evaluated in a deficient performance analysis and the outcome would be the same.

A. Sanchez

The *Sanchez* opinion holds that a gang expert cannot testify to case-specific facts asserted in hearsay statements unless such facts are within the expert's personal knowledge or independently supported by admissible evidence. A relatively small but significant portion of Detective Ford's testimony contained inadmissible hearsay. However, for the reasons that follow, we conclude the admission of this evidence was harmless.

"Hearsay is an out-of-court statement that is offered for the truth of the matter asserted, and is generally inadmissible." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.) The right of confrontation, as guaranteed by the Sixth Amendment to the federal Constitution and made applicable to the states through the Fourteenth Amendment, ensures the opportunity for cross-examination of adverse witnesses. (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the confrontation clause bars admission of out-of-court testimonial hearsay statements unless the declarant is unavailable and the defendant had a previous opportunity for cross-examination. (*Id*. at p. 59.)

Prior to *Sanchez*, expert witnesses could testify about out-of-court statements upon which they had relied in forming their opinions even if the statements were otherwise inadmissible under the hearsay rule. Case law held such evidence was not offered for its truth, but only to identify the foundational basis for the expert's testimony. (E.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618–620; *People v. Miller* (2014) 231 Cal.App.4th 1301, 1310.) Pursuant to this rationale, appellate courts deemed the use of out-of-court statements in an expert witness's "basis testimony" to be compliant with the hearsay rule and the requirements of *Crawford*. (*People v. Valadez* (2013) 220 Cal.App.4th 16, 30.)

The *Sanchez* opinion holds that a trier of fact must necessarily consider expert basis testimony for its truth in order to evaluate the expert's opinion, which implicates the hearsay rule and the Sixth Amendment right of confrontation. (*Sanchez, supra*, 63

Cal.4th at p. 684.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay.… If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686, fn. omitted.)

"The hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) However, the hearsay rule does apply to testimony regarding "*case-specific* facts," meaning "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Ibid*.) Unless subject to a statutory exception, such hearsay is inadmissible under state law. (*Id*. at pp. 674, 698; Evid. Code, § 1200, subd. (b).)

Federal constitutional issues arise if case-specific facts are presented in the form of testimonial hearsay. (*Sanchez, supra,* 63 Cal.4th at pp. 680–681, 685.) "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony." (*Id*. at p. 689.) Information contained in a police report is generally construed as testimonial hearsay because police reports "relate hearsay information gathered during an official investigation of a completed crime." (*Id*. at p. 694.)

The erroneous admission of testimonial hearsay is reviewed for prejudice under the standard described in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (See *Sanchez*, *supra*, 63 Cal.4th at pp. 670–671, 698.) The People must show, beyond a reasonable doubt, that the error did not contribute to the jury's verdict. (*Id.* at p. 698.) The erroneous admission of nontestimonial hearsay is a state law error, which is assessed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*Crawford, supra,* 541 U.S. at p. 68; *People v. Duarte* (2000) 24 Cal.4th 603, 618–619.) The *Watson* test

asks if it is reasonably probable the defendant would have obtained a more favorable result had the error not occurred. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

Detective Ford related certain information to the jury that he had learned from, and believed to be true based upon, his review of police reports, field identification cards, and conversations with other police officers. His testimony included hearsay relating to the existence of a specific criminal street gang, i.e., the Asian Bloods. To better frame the issue, we note a criminal street gang is defined as "any ongoing organization, association, or group of three or more persons … whose members individually or collectively engage in or have engaged in a *pattern of criminal gang activity*." (§ 186.22, subd. (f), italics added.) "A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' statutorily enumerated criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.'" (*People v. Zermeno* (1999) 21 Cal.4th 927, 930.) The list of qualifying offenses is found in section 186.22, subdivision (e)(1)–(33).

To satisfy the predicate offenses requirement, the prosecutor introduced People's exhibits No. 7 (Exhibit 7) and No. 8 (Exhibit 8). Exhibit 8 is a certified record of conviction for someone named Bounme Yang, who was adjudicated of resisting an executive officer (§ 69) and having a concealed firearm inside of a vehicle (former § 12025, subd. (a)(1)). The latter conviction was a qualifying offense under the gang statute. (§ 186.22, subd. (e)(32).) Exhibit 7 is a certified record of conviction for Jesse Saelee, who pleaded guilty to the qualifying offense of attempted murder. (§§ 187, 664, 186.22, subd. (e)(3).) Detective Ford testified both men were members of the Asian Bloods when they committed their crimes.

Detective Ford explained that his opinion regarding Bounme Yang's status as a gang member was based on "research into his gang history, based on my speaking with [the arresting officer in the case], based on the evidence that was located on the scene, including gang clothing, gang indicia, [and] my knowledge of the individuals that were

with him when [the offense was committed]." As for Jesse Saelee, Detective Ford's information and belief regarding Saelee's alleged gang membership was based on his review of police reports, "the workup that was done by [another police officer], and based on talking with the detectives."

The record is unclear in terms of whether, and to what extent, Detective Ford had personal knowledge of Bounme Yang's purported membership in the Asian Bloods. Although he was not involved in Yang's case as an investigating officer, Detective Ford apparently served as an expert witness during the prosecution phase and claimed to have "testified on that case." Yang's crime of resisting an executive officer was found to be gang-related within the meaning of section 186.22, subdivision (b)(1). Given Detective Ford's involvement in Yang's prosecution, his personal knowledge of Yang's membership in the Asian Bloods is reasonably inferable.

With regard to Jesse Saelee, Detective Ford had merely been on patrol at the time of the offense and testified he "might have" responded to the scene to provide assistance to the arresting officers. By his own admission, Detective Ford's opinion regarding Saelee's gang status was derived entirely from hearsay sources, i.e., police reports and conversations with other law enforcement officers. Since there was no independent evidence of Saelee being a member of the Asian Bloods, we conclude the expert's testimony on that point was inadmissible.

There is a split of authority regarding whether a gang expert's testimony about predicate offenses entails "case-specific facts" as contemplated by *Sanchez*. One view holds that evidence of a pattern of criminal activity by alleged gang members should be classified as "general background information" and thus treated as subject matter about which a qualified expert may relate hearsay. (*People v. Blessett, supra,* 22 Cal.App.5th at pp. 943–945, review granted; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.) The opposing perspective is that facts related to predicate offenses are case specific.

(*People v. Lara* (2017) 9 Cal.App.5th 296, 337; *People v. Ochoa* (2017) 7 Cal.App.5th 575, 583, 588–589.)

As noted, case-specific facts are defined as "those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) "Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge." (*Ibid.*)

The *Sanchez* decision expressly "restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez, supra*, 63 Cal.4th at p. 685.) To illustrate this distinction, the high court provided the following example: "That an associate of the defendant had a diamond tattooed on his arm would be a case-specific fact that could be established by a witness who saw the tattoo, or by an authenticated photograph. That the diamond is a symbol adopted by a given street gang would be background information about which a gang expert could testify. The expert could also be allowed to give an opinion that the presence of a diamond tattoo shows the person belongs to the gang." (*Id.* at p. 677.)

In our view, whether an alleged predicate offense occurred and was committed by a member of a particular gang is analogous to the presence of a diamond tattoo on an associate's arm in the above example, not to an expert's opinion of what the tattoo may signify. Since the existence of a criminal street gang is an element of section 186.22 that requires proof of a pattern of criminal gang activity, and the occurrence of specific predicate offenses is a factual matter upon which the prosecution's theory of the case depends, testimony concerning the predicate offenses may be construed as "relating to

the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra,* 63 Cal.4th at p. 676.) This admittedly broad construction of the term "case-specific facts" seems reasonable and correct in light of the only alternative, which would be to characterize details about *specific* crimes committed by *specific* individuals as "general background information," i.e., "testimony regarding [the expert's] general knowledge in his field of expertise."[4] (*Id*. at pp. 676, 678.)

Detective Ford's testimony about the predicate offenses entailed "case-specific facts" not only because the evidence related to an element of the gang charges, but also because appellants were alleged to have had peripheral involvement in both incidents. Blong was reportedly with Bounme Yang when Yang committed the qualifying firearm offense. Smith was allegedly "contacted with Jesse Saelee" during the investigation into Saelee's predicate offense, and Detective Ford relied on that connection in forming his opinion that Smith "associates with other gang members." Given these circumstances, we conclude the evidence related to the "participants alleged to have been involved in the case being tried" and was therefore case-specific. (*Sanchez*, *supra*, 63 Cal.4th at p. 676.)

In summary, the crimes reflected in Exhibits 7 and 8 were used to establish the predicate offenses element for count 3 and for the gang enhancements on counts 1 and 2. Without Detective Ford's inadmissible hearsay testimony, the jury had no basis upon which to conclude at least two of those crimes were committed by members of the Asian Bloods, leaving an evidentiary gap in the People's theory of liability. (E.g., *People v. Vasquez* (2016) 247 Cal.App.4th 909, 922 ["'The existence of a criminal street gang is

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[4]We realize section 186.22 also requires proof of a gang's primary activities, and an expert's testimony on that topic is arguably more akin to general background information. (Accord, *Sanchez, supra,* 63 Cal.4th at p. 698 [describing as "background testimony" information related about a particular gang's "conduct and its territory"].) However, in most instances, if not all, such testimony is at least partially derived from the expert's personal knowledge obtained during the course of his or her police work. In this case, for example, Detective Ford described having personal knowledge that certain crimes were among the primary activities of the Asian Bloods.

unquestionably an element of both the enhancement and the substantive offense'"].) However, after consideration of the supplemental briefing, we are persuaded the charged crimes and other admissible evidence identifying Smith and Blong as members of the gang were sufficient to support the jury's findings.

The People deny there was prejudice because the charged crime of assault with a deadly weapon is a qualifying offense under section 186.22, subdivision (e)(1). The argument is based on *People v. Loeun* (1997) 17 Cal.4th 1, which holds prosecutors can rely on evidence of a currently charged offense to satisfy the predicate offenses element of the gang statute. (*Id*. at p. 10; accord, *People v. Tran* (2011) 51 Cal.4th 1040, 1046.) In *Loeun*, the requisite pattern of criminal gang activity was established "[t]hrough evidence of defendant's commission of the charged crime of assault with a deadly weapon on [the victim] and the separate assault on [the same victim] seconds later by a fellow gang member…." (*Loeun*, at p. 14.)

During closing argument in this case, after discussing Exhibits 7 and 8, the prosecutor directed the jury's attention to the charged offenses: "In red [referring to a visual aid], there's ADW, assault with a deadly weapon. That's in red to remind you the current crimes count. So you can use the 245s with deadly weapon outside the store and inside the store to help show that there is a pattern of criminal activity by the Asian Blood gang."

The jury was instructed with an adapted version of CALCRIM No. 1400, which stated, in pertinent part, "A *pattern of criminal gang activity*, as used here, means: [¶] 1. The commission of or conviction of any combination of two or more of the following crimes: Attempted Murder in violation of Penal Code section 664/187(a), or Having a Concealed Firearm in a Vehicle in violation of former Penal Code section 12025(a)(1) …." The crimes listed corresponded to those in Exhibits 7 and 8.

Elsewhere in the same instruction, the jury was told, "If you find the defendant guilty of a crime in this case, you may consider that crime in deciding whether one of the

group's primary activities was commission of that crime, and whether a pattern of criminal gang activity has been proved." The latter advisement was repeated in a separate instruction on the gang enhancement allegations. Although potentially confusing given how a "pattern of criminal gang activity" was defined, the jury presumably understood these instructions supported the People's argument that the charged offenses qualified as additional predicates. (E.g., *People v. Young* (2005) 34 Cal.4th 1149, 1202 [reviewing courts "must consider the arguments of counsel in assessing the probable impact of the instruction on the jury"]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 997 ["Jurors are presumed to be intelligent people, capable of understanding and correlating all instructions"].)

In similar situations, some courts have found the instructional definition of a "pattern of criminal gang activity" to have a limiting effect. (*People v. Lara*, *supra*, 9 Cal.App.5th at pp. 331, 337; *People v. Garcia* (2014) 224 Cal.App.4th 519, 525.) These cases rely on the principle that a reviewing court cannot affirm a conviction based on theories not presented to the jury. (*People v. Kunkin* (1973) 9 Cal.3d 245, 251; *People v. Smith* (1984) 155 Cal.App.3d 1103, 1145.) Here, the prosecutor *did* advance a theory of the charged offenses satisfying the pattern of criminal gang activity requirement, and the instructions contained language supporting that argument. To the extent a portion of the instruction could be deemed erroneous or needlessly restrictive, we would find the circumstance harmless given the overwhelming proof that appellants assaulted the victim with a deadly weapon, i.e., committed a qualifying predicate offense. (Cf. *Neder v. United States* (1999) 527 U.S. 1, 15–17 [omission of an essential element of a crime in jury instructions is subject to *Chapman* harmless error test]; accord, *People v. Mil* (2012) 53 Cal.4th 400, 409.)

Detective Ford's predicate offenses testimony was the primary instance of *Sanchez* error. Appellants' remaining arguments concern the expert's testimony about a person

named Brandon Saechao and Blong's and Smith's association with gang members Bounme Yang and Jesse Saelee. We address these issues in turn.

Detective Ford testified Smith had told him he was assaulted by Norteños on "the same day that an individual by the name of Brandon Saechao was murdered in front of [Smith's] residence." In a separate interview with Blong, Blong indicated the victim in this case had a connection to the "guys that shot Brandon in '09." These disclosures were admissible under Evidence Code section 1220 as party statements, an exception to the hearsay rule. Nevertheless, appellants complain Detective Ford conveyed hearsay by also stating, "In talking with individuals related to the case, it was believed to be Nortenos who committed the murder of Brandon Saechao in front of [appellants'] residence." This argument ignores other admissible testimony wherein the expert explained how the feud between the Norteños and Asian Bloods began "right around the same time as the homicide of Brandon Saechao." Thus, the gang motive was readily inferable without the hearsay statement. The inference was further supported by the fact the victim was called a "Buster" by one or more of the assailants.

We also find no prejudice in the use of hearsay to show appellants' associations with Bounme Yang and Jesse Saelee. At trial, appellants acknowledged having family and friends who are gang members. Detective Ford not only claimed Smith and Blong had admitted their gang membership to him, but he also testified accomplices Joshua Xiong and Meng Yang had told him they were gang members. Since Detective Ford had personal knowledge of these admissions, his opinion testimony regarding the membership status of those individuals was admissible. Joshua Xiong was the principal offender, i.e., the person who had repeatedly struck the victim with his cane. The jury saw photographs of Smith and Xiong together wearing red clothing (i.e., the signature color of the Asian Bloods) and flashing alleged gang signs. The admissible evidence of appellants' gang ties was insurmountable. Therefore, and pursuant to the foregoing

analysis, we conclude the collective impact of all *Sanchez* errors was harmless beyond a reasonable doubt.

B. Elizalde

The *Elizalde* case holds that questions about gang affiliation posed to an arrestee while processing him or her into jail do not come within the historically recognized "booking exception" to the requirements of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). (*Elizalde*, *supra*, 61 Cal.4th at pp. 531–535.) While it is permissible for jail officials to ask questions about gang affiliation during the booking process, the answers to such questions are inadmissible in the prosecution's case-in-chief unless they were preceded by *Miranda* admonitions and a waiver of the right to remain silent. (*Elizalde*, *supra*, at p. 541.) The erroneous admission of a jail classification statement obtained in violation of *Miranda* is reviewed for prejudice under the *Chapman* standard. (*Elizalde*, at p. 542.)

The People introduced several inmate classification questionnaires filled out by appellants, codefendant Saeteurn, and accomplices Jonathan Yang and Meng Yang. In his briefing, Smith argues Detective Ford "testified at length regarding jail classifications, covering more than 20 pages of trial transcript." This is true. Detective Ford also testified that an admission of gang membership in a custodial facility is the most reliable indicator of a person's gang affiliation. The answers given during a jail classification interview determine where the arrestee will be housed, and being housed with gang members can have deadly consequences, especially if the arrestee is affiliated with a rival group. "[I]n essence, you lie, you die."

We have already summarized the contents of appellants' inmate classification questionnaires. Again, Smith was jailed on three occasions and twice acknowledged an association with the Asian Bloods. He admitted the association in 2007, denied associating with gangs in 2008, and admitted again in 2012 when booked on the charges

in this case. In all three instances, he wrote "Northerners" in response to a question regarding his known enemies. Blong denied being associated with gangs on all four of his questionnaires but sometimes wrote "North" or "Buster" with regard to his known enemies. Codefendant Saeteurn denied having gang associations following arrests in January 2012 and in the current case, but he described his enemies as "Nortes" and "Busters." Meng Yang, following his arrest in this case, admitted associating with the Asian Bloods and wrote "Norteno" in response to the question about his enemies. Jonathan Yang denied associating with gangs in 2010 but identified his enemies as "Northerners." When arrested in this case, he admitted associating with "Asian" gangs but wrote "none" in response to the enemies question.

In light of *Elizalde*, appellants argue their inmate classification questionnaires and testimony concerning those documents were erroneously admitted. They further contend any admissions made during their jail intake interviews were involuntary confessions, and that they have standing "to challenge the un-*Mirandized* and involuntary 'self admissions' of … co-defendant Saeteurn, and other persons alleged by the prosecution to be affiliated with gangs." We need not address the latter contentions. Assuming all of the jail classification documents and related testimony was erroneously admitted, the errors were harmless. In *Elizalde*, the error was found harmless beyond a reasonable doubt because the defendant's gang membership was established through independent evidence, i.e., "by three witnesses who testified that they knew him to be a [gang] member." (*Elizalde*, *supra*, 61 Cal.4th at p. 542.) This case similarly involves convincing independent proof of appellants' gang ties and the gang-related nature of the charged offenses.

Detective Ford testified to having spoken with all six of the charged perpetrators about their gang affiliations. Whereas appellants' classification questionnaires indicated they "associate" with gangs, both of them admitted to Detective Ford that they were gang *members*. In addition, both admitted to associating with gang members during their trial

testimony. Smith complains of the prosecutor using the jail classification evidence to impeach other parts of his trial testimony. However, it has long been held that "a defendant's out-of-court statements obtained in violation of *Miranda* [can] be used to impeach the defendant's testimony." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1075, citing *Harris v. New York* (1971) 401 U.S. 222, 225.)

Codefendant Saeteurn told Detective Ford he was not a gang member but admitted to associating with such individuals. During the attack on the victim, Saeteurn wore a red shirt and a red hat with a large "B" logo on it. Jonathan Yang, who also wore red during the incident, likewise denied gang membership but admitted association. Meng Yang admitted to Detective Ford that he was a member of the Asian Bloods.

There were no jail classification documents or related testimony for the principal offender, Joshua Xiong. Detective Ford testified Xiong had previously told him he was a gang member. During the subject incident, Xiong wore a red sweatshirt and red shoes, and he struck the victim with a cane painted red. As mentioned, the jury saw photographs of Xiong and Smith together wearing red and displaying alleged gang signs. Given these facts and all the admissible evidence previously discussed, the gang verdicts were virtually inevitable regardless of any evidence concerning the jail intake interviews. We thus conclude the *Elizalde* errors were harmless beyond a reasonable doubt.

III. Due Process Claim

Appellants contend the erroneous admission of gang evidence as a result of *Elizalde* and/or *Sanchez* error violated their constitutional due process rights by depriving them of a fair trial and that such error requires reversal of their convictions of assault with a deadly weapon. We are not persuaded.

"A person seeking to overturn a conviction on due process grounds bears a heavy burden to show the procedures used at trial were not simply violations of some rule, but are fundamentally unfair. [Citation.] Ordinarily, even erroneous admission of evidence

does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair." (*People v. Esayian* (2003) 112 Cal.App.4th 1031, 1042.) Appellants' "fundamental unfairness" argument vis-à-vis the convictions on counts 1 and 2 is poorly developed, and they offer little more than citations to *People v. Albarran* (2007) 149 Cal.App.4th 214.

In *Albarran*, a prosecutor introduced evidence of the defendant's membership in a gang to substantiate certain enhancement allegations but engaged in "overkill" by subjecting jurors to police testimony about the gang that "consumed the better part of an entire trial day." (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 228 & fn. 10.) The testimony focused on the identities of other gang members, descriptions of unrelated criminal activity committed by other gang members, evidence of the gang's threats to kill police officers, and references to the Mexican Mafia—all of which was found on appeal to be "irrelevant to the underlying charges" and to have had "no legitimate purpose in [the] trial." (*Id*. at pp. 227–231.) The irrelevant gang evidence created "a real danger that the jury would improperly infer that whether or not [defendant] was involved in [the charged offenses], he had committed other crimes, would commit crimes in the future, and posed a danger to the police and society in general and thus he should be punished. Furthermore, [the] gang evidence was extremely and uniquely inflammatory, such that the prejudice arising from the jury's exposure to it could only have served to cloud their resolution of the issues." (*Id*. at p. 230, fns. omitted.)

Case law holds that "admission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) However, when evidence of gang activity or membership is important to the issues of motive and intent, it can be introduced despite its prejudicial nature. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 413; e.g., *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 ["Gang evidence is relevant and admissible when the very

reason for the underlying crime, that is the motive, is gang related"].) "The admission of *relevant* evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913, italics added.)

It was apparent from the admissible evidence that this was a gang case. The victim testified his attackers had called him a "Buster," and Blong indicated to Detective Ford during custodial interrogation that the victim was assaulted because of a perceived Norteño affiliation. All of the gang evidence was relevant, either to the issue of motive with respect to counts 1 and 2 or to proving the essential elements of count 3 and the gang enhancement allegations. Detective Ford permissibly testified to self-admissions of gang membership made to him by Blong, Smith, and others involved in the incident, and the jury saw properly admitted photographs of Blong and Smith wearing "gang clothing," flashing gang signs, and associating with other alleged gang members. Appellants' own trial testimony further confirmed their history of associating with gang members. The inadmissible gang evidence was not "extremely and uniquely inflammatory," and this case does not present "one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the [defendants'] trial fundamentally unfair." (*People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 230–231.)

We also reject the implied argument, apart from the due process claim, that prejudice arose from *Sanchez* error and/or *Elizalde* error in relation to the verdicts on counts 1 and 2. The implication is that hearing inadmissible evidence of appellants' gang ties, combined with the revelation they had been jailed on prior occasions, tainted the jury's ability to objectively decide if they were guilty of having assaulted the victim. First, the incident was documented on video. The jurors were well equipped to determine whether appellants were among those who could be seen committing the charged offenses. Second, Smith admitted, during a recorded custodial interview, to having participated in the assault that occurred inside of the store (i.e., the count 2 offense).

Between the video evidence, his prior partial admission of guilt, and the admissible evidence of his gang connections, we perceive no likelihood the verdict on count 1 (the initial attack outside of the store) would have been different but for *Sanchez* error and/or *Elizalde* error.

As for Blong, the video evidence and admissible testimony of Detective Ford left little chance of a more favorable outcome on counts 1 and 2, even though Blong denied any involvement in the crimes. His gang ties were independently established by prior admissions to Detective Ford, the photos from his Myspace page, and his own trial testimony. While one could infer a propensity to commit crimes based on his numerous bookings into the county jail, such a conclusion was more powerfully compelled by the evidence of his prior felony convictions. It is therefore evident, beyond any reasonable doubt, that the erroneous admission of gang evidence did not affect the guilty verdicts on counts 1 and 2.

IV. Cross-examination of Defense Experts

Smith presents an additional claim regarding the prosecution's cross-examination of appellants' gang experts on matters of law, including the experts' familiarity with provisions of section 186.22. Blong summarily joins in these arguments. We find no grounds for reversal.

A. Additional Background

Jesse De La Cruz, Ph.D., served as an expert witness for Blong and codefendant Saeteurn. Dr. De La Cruz is a convicted felon and was a member of the Nuestra Familia prison gang during the 1970's. He was 63 years old at the time of trial and admitted to having spent the majority of his life engaged in criminal activity. In the late 1990's, Dr. De La Cruz abandoned his former lifestyle and focused on self-improvement. He obtained degrees in sociology and social work in 2001 and 2003, respectively, and went on to become an educator, published author, participant in community outreach

programs, and a member of various organizations devoted to criminal rehabilitation and anti-gang endeavors.

In July 2014, Dr. De La Cruz obtained his doctorate in education. His doctoral thesis focused on the lives of Latino gang members in Stockton. Based on his interviews with 56 self-admitted gang members, and relying on additional research and his own life experience, he developed a list of eight "indicators that most gang members have." His criteria for determining whether someone is a gang member is as follows: (1) "[G]eneral emotional assessment" (this factor is not clearly explained in the record); (2) A criminogenic background, meaning a family history of criminal behavior and incarceration; (3) No legitimate work history ["[g]ang members generally don't work"]; (4) Poor performance in school; (5) An extensive criminal record; (6) Substance abuse problems; (7) Tattoos ["they usually have the gang tattoo specific to their gang"]; and (8) Association with gang members.

After interviewing Blong, reading police reports on the charged offenses, and applying his eight indicators, Dr. De La Cruz concluded and opined that Blong was not a gang member. He gave weight to Blong's "calm [and] collected" demeanor during their interview, his conclusion there was no criminogenic family background, Blong's graduation from high school, history of temporary employment for periods of "two or three months at a time," lack of substance abuse problems, and the absence of tattoos on his body. The latter circumstance was deemed "very important" because "[i]f you're going to be representing the gang … [y]ou want to let everybody know." He discounted Blong's prior felony convictions because none of the crimes were gang related. As for the final indicator, Dr. De La Cruz was under the impression that, apart from Blong's family members, Bounme Yang (subject of the predicate offense documented in Exhibit 8) was "the only guy … that they connected him to as far as being a gang member."

Blong's attorney posed a hypothetical scenario adapted from the trial evidence, notably asking the expert to assume the victim had called one of the assailants a "gook."

The expert was then asked if he could conclude a gang crime had been committed. He replied, "No, I could not. I would not classify it as a gang crime. I'd classify it as a racial crime."

Smith's gang expert was Albert Ochoa, a behavioral interventionist for the Visalia Unified School District. His expertise in local gang culture was derived from his experiences working with teenage gang members. Mr. Ochoa's testimony was unusually brief. The direct examination, which addressed his qualifications and ultimate opinions, spans nine pages of the reporter's transcript.

Smith's trial counsel posed a hypothetical scenario wherein a group of Asian males attacked a Hispanic male who had "used a racial slur like 'gook,' called [them] a racial insult." Mr. Ochoa was then asked if he believed the attack was "in furtherance or at the benefit or at the direction of a criminal street gang." He replied, "No, it's not," and referenced his experiences with young men who can't control their anger when subjected to a racial slur. Next, Mr. Ochoa opined it is possible for a person to commit a crime in association with a gang member without the intent to benefit a gang. He responded affirmatively when counsel asked, "have you ever seen where people associate with a gang, meaning that they're around them but have no other connection with them [¶] … [¶] [a]nd commit no crimes?"

During cross-examination of Dr. De La Cruz and Mr. Ochoa, the prosecutor inquired of their familiarity with the provisions of section 186.22. The experts were also asked if they had ever read CALCRIM Nos. 1400 and 1401, and whether they were aware that nongang members are still subject to liability under the gang statute. Objections were made to most of these questions, and some of the objections were overruled. In closing argument and rebuttal, the prosecutor criticized the experts for not knowing the applicable law.

Appellants allege the trial court erred by overruling certain objections in light of case law condemning opinion testimony on matters of law and statutory interpretation.

Smith further alleges ineffective assistance of counsel based on his trial counsel's failure to base his objections on proper grounds, e.g., only raising an "argumentative" objection during closing argument and rebuttal. The prosecutor's questions and comments are also characterized as prosecutorial misconduct.

B. Analysis

Even if we assume every assertion of error has merit, the claims fail for lack of prejudice. First, we incorporate by reference the harmless error analyses set forth in earlier sections of the opinion. Second, we note the following with respect to the testimony of both defense experts.

Dr. De La Cruz testified out of order, before Detective Ford appeared as an expert witness, and he was not recalled to address Detective Ford's expert testimony. Dr. De La Cruz's opinions did not account for the admissions of gang membership made to Detective Ford by Blong, Smith, Joshua Xiong, and Meng Yang. Furthermore, the questions about section 186.22 and CALCRIM No. 1400 were a relatively small component of the prosecutor's cross-examination. She impeached Dr. De La Cruz's credibility by highlighting his self-admitted crimes of moral turpitude. His criminal past included a drive-by shooting wounding two people, two different stabbings, and a residential burglary. Heroin addiction was another contributing factor to his five separate commitments to state prison. Furthermore, Dr. De La Cruz conceded he had no personal knowledge of, or experience with, Asian gang culture in the Visalia area.

Smith's expert, Mr. Ochoa, offered generalized opinions with no depth of analysis. He ignored or disregarded all of the gang evidence in this case. When confronted with some of that evidence on cross-examination, he testified (without further explanation) it had no impact on his opinions. Frankly, the verdicts would have been the same had the People elected not to cross-examine Mr. Ochoa at all. For the reasons stated, we conclude the alleged errors were harmless by any standard of prejudice.

V. Cumulative Error

Appellants allege cumulative error.

Under the cumulative error doctrine, "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844; accord, *In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) The "litmus test is whether the defendant received due process and a fair trial. Accordingly, we review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349, overruled on other grounds in *People v. Whitmer* (2014) 59 Cal.4th 733, 739–742.) Having conducted such an analysis, we conclude none of the errors alleged on appeal—whether considered individually or collectively—resulted in prejudice.

VI. Senate Bill 1393

On September 30, 2018, the Governor approved Senate Bill 1393, which amended sections 667, subdivision (a)(1), and 1385, subdivision (b). The legislation went into effect on January 1, 2019. (Stats. 2018, ch. 1013, §§ 1–2.) As a result, trial courts now have discretion under section 1385 to strike or dismiss the five-year sentencing enhancement prescribed by section 667 for prior serious felony convictions.

The parties agree Senate Bill 1393 applies retroactively to nonfinal judgments. Absent evidence to the contrary, it is presumed the Legislature intended statutory amendments reducing the punishment for a crime to apply retroactively to defendants whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Consistent with the case law on this issue, we accept the parties' position. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

Despite conceding the issue of retroactivity, the People oppose remanding the case for a new sentencing hearing. They argue "the record clearly indicates [the trial court] would not have dismissed the prior serious felony enhancement even if it had discretion to do so." In support of this argument, it is noted the trial court imposed the upper term for count 1 plus a 10-year term under section 186.22, subdivision (b)(1)(C). The trial court had stricken punishment for the same gang enhancement when sentencing Smith and codefendant Sou Saeteurn.

Several appellate courts have adopted the following standard for this type of situation: "Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Although the trial court imposed heightened punishment based on Blong's history of recidivism and other aggravating factors, it also exercised a certain degree of leniency. Whereas the probation department had recommended a total prison term of 28 years, the trial court ordered his sentence on count 2 to be served concurrently, thus resulting in an aggregate term of 23 years. On this record, it would be unduly speculative for us to assume the trial court would not have further reduced Blong's sentence had the law permitted such a disposition. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 426; cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand where trial court had "stated that imposing the maximum sentence was appropriate" and called defendant "'the kind of individual the law was intended to keep off the street as long as

possible'"].) Even without the prior serious felony enhancement, Blong's sentence would have been significantly longer than those of his accomplices.[5]

For the reasons discussed, the matter will be remanded to allow the trial court to consider exercising its discretion to strike or dismiss the five-year enhancement for Blong's prior serious felony conviction.

DISPOSITION

The judgment against Smith Yang is affirmed.

As to Blong Yang, the matter is remanded to allow the trial court to consider whether to strike or dismiss the section 667, subdivision (a) enhancement pursuant to section 1385, as amended by Senate Bill 1393. In all other respects, the judgment against Blong Yang is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
HILL, P.J.

_____
SMITH, J.

[5]Blong's codefendants at trial received seven-year prison terms. The trial court claimed to have imposed six-year terms against Meng Yang and Jonathan Yang. Joshua Xiong reportedly received a suspended eight-year prison term and was granted felony probation.